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UNITED STATES OF AMERICA
BEFORE THE
DEPARTMENT OF ENERGY

Loan Guarantees for Projects that Employ Innovative Technologies	))	**RIN 1901-AB21 10 C.F.R. Part 609**

Pursuant to the Notice of Proposed Rulemaking and Opportunity for Comment ("NOPR") issued by the Department of Energy (the "Department") on May 16, 2007, 72 Fed. Reg. 27471 (May 16, 2007), Ameren Services Company ("Ameren") hereby submits its comments on the NOPR. While Ameren appreciates the Department's concerns regarding financial risk for the Federal government, significant changes need to be made to the proposed rule to ensure that the loan guarantee program's goal of encouraging commercial use in the United States of new or improved technologies by supporting such projects with loan guarantees is achieved.

Technologies

Because the chief purpose of the loan guarantee program, as enacted in Title XVII of the Energy Policy Act of 2005 ("EPAct"), is to support projects in the United States that "employ new or significantly improved technologies" (which terms are not defined in the statute) while also ensuring a "reasonable prospect of repayment of the principal and interest," the Department has concluded that it must use its "discretion and judgment" to define the relevant statutory terms. NOPR, 72 Fed. Reg. at 27473, quoting Sections 1702(d)(1) and 1703(a)(2) of EPAct. Having determined that technologies for innovative project proposals must be mature enough to assure dependable commercial operations that will generate sufficient revenues to service the project's debt, the Department establishes that projects that are solely research, development or demonstration projects will not be eligible for Title XVII loan guarantees. *Id.*

The Department then proposes to define "new or significantly improved technology" as "technologies concerned with the production, consumption or transportation of energy, and that have either only recently been discovered or learned, or that involve or constitute meaningful and important improvements in the productivity or value of the technology." Ameren supports this proposed definition, so long as the phrase "in service in the United States at the time the guarantee is issued" is added at the end of the definition. This phrase is part of the statutory definition of "new or significantly improved technology" and therefore should be included in the definition used in the Department's regulations in order to fully implement the intent of Congress. *See* Section 1703(a)(2) of EPAct.

The Department next proposes two alternative standards for determining that a technology is "innovative." The first alternative provides that a technology would be considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been ordered for, installed in or used in five or more projects in the United States at the time the loan guarantee is issued. NOPR, 72 Fed. Reg. at 27474. The second alternative is that a technology would be considered to be in general use, and therefore not eligible for a Title XVII loan guarantee, if it has been in operation in a commercial project in the United States for a particular number of years (the Department proposes five years). *Id.* The five-year period would begin on the date that the technology is commissioned on the particular commercial project. *Id.* The Department further proposes that, regardless of which of the two alternatives is used, a project may be eligible for a Title XVII loan guarantee if it uses technology that has been used in any number of projects outside the United States and for any period of time outside the United States, so long as the technology is not in "general use" in the United States. *Id.*

With respect to the two alternative standards, Ameren suggests that rather than adopting either as a bright line test, the Department should adopt both standards as a rebuttable presumption, such that an applicant whose project does not meet the standards would still have an opportunity to demonstrate that its project uses innovative technology that is more advanced than research and development but still not in general use. In this area where technology is evolving rapidly, bright line tests may be too restrictive. Failing their adoption as a rebuttable presumption, the two alternatives should both be adopted, as a single standard, *i.e.*, a technology would not be considered "innovative" if there are five or more projects in the United States employing that technology and it has been in operation in a commercial installation for a period of five years. The financial markets want to see both multiple projects and years of operation in order to be confident that a technology is commercially viable and financeable, so a technology that is not in use in multiple projects and not in operation for at least five years will need support.

Ameren also supports the proviso that, regardless of whether five years have passed and/or five projects are in operation, a project will be eligible for a Title XVII loan guarantee if it uses a technology that has been used in any number of projects for any number of years outside the United States, so long as the technology is not in general use in the United States. The use of the phrase "in service in the United States" in EPAct indicates a Congressional intent that the loan guarantee program encourage the adoption of innovative technologies developed in other countries and the Department's proposed language regarding technologies in service outside the United States recognizes and implements this intent.

Project Costs

Title XVII specifies that any loan guarantee issued by the Department may not exceed "80 percent of the project cost of the facility that is the subject of the guarantee." Section 1702(c) of EPAct. EPAct does not define the phrase "project cost of the facility." The NOPR would define "Project Costs" as those costs that are necessary, reasonable, customary and directly related to the design, engineering, financing, construction, start-up, commissioning and shake down of an eligible project, and would exclude from "Project Costs" initial research and development costs, the credit subsidy cost, any administrative fees paid to the Department and operating costs after the facility has been placed in service. *See* NOPR, 72 Fed. Reg. at 27474.

There is no basis for the NOPR's proposal to establish a category of "excluded costs." Section 1702 of EPAct does not contemplate any exclusion of costs when it establishes the 80 percent level of guarantee support. Further, although the NOPR states its rationale for the exclusion of certain costs as designed to prevent these costs from being shifted to taxpayers in the event of default, there is no explanation as to why these costs are any less suitable for or worthy of being guaranteed. Ameren submits that parsing out categories of costs, particularly the costs of research and development, would not be conducive to encouraging innovation.

Payment of the Credit Subsidy Cost

The Department's current intent, as expressed in the NOPR, is to implement the Title XVII program only through the self-pay authority of the statute, under which a borrower must pay the credit subsidy costs, even though EPAct also provides the option of covering credit subsidy costs through an appropriation by Congress. *See* NOPR, 72 Fed. Reg. at 27475.

Ameren urges the Department not to restrict the avenues for payment of the credit subsidy costs to the self-pay option. Congress ultimately may appropriate some or all of the monies needed to fund the credit subsidy costs. Therefore, the Department should develop rules that are flexible enough to accommodate that possibility. This would be consistent with other federal loan guarantee programs, such as the program administered by the Export-Import Bank of the United States ("Ex-Im Bank"). Under the Ex-Im Bank's loan guarantee program, which was authorized in the Export-Import Bank Act of 1945 (12 U.S.C. § 635), the Ex-Im Bank cannot impose terms and conditions on the credit support it provides unless those terms are competitive with the terms on which United States exporters' primary competitors can obtain credit support. 12 U.S.C. § 635(b)(1)(A). Similarly, the Ex-Im Bank cannot impose a credit application fee unless the fee is "competitive with the average fee charged by the Bank's primary foreign competitors" and if the exporter "is given the option of paying the fee at the outset of the loan or over the life of the loan." 12 U.S.C. § 635(b)(1)(B). In summary, the Ex-Im Bank maintains a level of flexibility regarding the terms and conditions related to the loan guarantees it provides in order to best achieve its goal of promoting United States exports. The Department should structure its loan guarantee program so that it provides similar flexibility, in order to best achieve the goal of commercializing innovative technologies.

Assessment of Fees

Title XVII of EPAct requires the Department to charge and collect fees to cover the administrative costs of issuing a loan guarantee. *See* Section 1702(h) of EPAct. Such fees cover the costs of evaluating pre-applications and applications for loan guarantees, offering a term sheet, executing a conditional commitment, negotiating and closing a loan guarantee, and servicing and monitoring loan guarantee agreements, including during construction, start-up, commissioning, shake down and operations of a project subject to a loan guarantee. *See* NOPR, 72 Fed. Reg. at 27475.

The NOPR proposes that the requirement to pay administrative fees would begin when an application is submitted. *Id.* Those project sponsors who submit pre-applications and are denied further consideration would not be charged any fees for the administrative expenses incurred in reviewing their pre-application materials. *Id.* Pre-applicants who are invited to submit an application but decline to do so also will not be charged a fee. *Id.*

The NOPR further proposes that the fees assessed to borrowers who submit applications and enter into conditional commitments will cover only the administrative expenses associated with those borrowers' applications. *Id.*

Ameren seeks clarification as to how the Department anticipates recovering the costs associated with evaluation of pre-applications that progress no farther. Given that the Department has made a deliberate choice to recover less than its full administrative costs of reviewing pre-applications, the costs not recovered should be borne by the Department through its existing budget and appropriations, rather than using funds appropriated specifically for loan guarantees. It would be inappropriate to reduce funds specifically appropriated for loan guarantees to cover Department administrative expenses that the Department has chosen to bear.

Financial Structure

The 90 Percent Limitation. Title XVII provides that a loan guarantee shall not exceed 80 percent of the project costs of a facility and requires the Department to determine that there is a reasonable expectation that the borrower will repay the principal and interest. *See* NOPR, 72 Fed. Reg. at 27476, citing Section 1702 of EPAct.

To balance the goals of encouraging the use of new or significantly improved technologies and limiting the financial exposure of the Federal government, the NOPR proposes that the Department would guarantee up to 90 percent of a particular debt instrument or loan obligation for an eligible project, so long as DOE's guarantees do not account for more than 80 percent of the Project Costs (as the NOPR would define these costs). NOPR, 72 Fed. Reg. at 27476.

Ameren has significant concerns with the NOPR's proposal to limit the guarantee to 90 percent of the debt instrument or loan obligation. Specifically, this limitation is inconsistent with the overarching goal of the legislation, which is to provide a loan guarantee for 80 percent of a project's cost. For example, if a project is 80 percent debt-financed, the 90-percent limit is equivalent to a guarantee of only 72 percent of the project costs, as 90 percent of a debt instrument that represents 80 percent of the project's cost equals a guarantee of only 72 percent of the total project costs. There is no basis in EPAct for such a limitation, which can only serve to dilute the incentives intended by Congress. Further, the Department's stated reason for such a limitation – that lenders need to have some money at risk to force them to engage in due diligence in making a loan – is purely speculative and assumes that the project sponsors and lenders are indifferent to the many transaction costs incurred in applying for the loan guarantee, making the loan and potentially dealing with a failed project. It is unlikely that sophisticated players in the debt markets will blithely lend to weak projects solely on the strength of a loan guarantee.

Ameren notes that the Ex-Im Bank's loan guarantee program, discussed above, is statutorily limited to providing financing only "in amounts up to 85 percent of the total costs of the exports involved." 12 U.S.C. § 635(a)(2)(A)(ii). The Ex-Im Bank provides loan guarantees to the full extent authorized by statute, leaving the other 15 percent of total costs payable from the buyer's own funds or borrowed from a commercial lender, independent of the federal guarantee.

Stripping and Subordination. In connection with any loan guaranteed by the Department that may be participated in, syndicated, traded, or otherwise sold on the secondary market, the NOPR would require that the guaranteed portion and the non-guaranteed portion of the debt instrument or loan are sold on a pro-rata basis and would prohibit the guaranteed portion being "stripped" from the non-guaranteed portion. *Id.* Also, Title XVII provides that a loan that is the subject of a Title XVII guarantee may not be subordinate to other financing and requires that, in the event of default and the Department's subsequent acquisition of property, the Department's rights shall be superior to those of any other person. *Id.* citing Section 1702(g) of EPAct. The Department interprets the latter provision to require that it possess a first-lien priority in the assets of the projects and other assets pledged as security. *Id.*

The NOPR's proposal regarding stripping would have an adverse effect on the marketability of the debt. Potential buyers interested in the portion of the debt that is guaranteed very likely will not be interested in the non-guaranteed portion and *vice versa*. The Department therefore should reconsider the prohibition on stripping. The Department also should revisit its interpretation of the subordination and default provisions of Title XVII. Notwithstanding the provisions regarding default, with respect to subordination, Title XVII specifies only that no other financing may have superior priority to the loan guarantee, *i.e.,* that the loan guarantee may not be subordinated to other debt. EPAct does not, on its face, require that all other financing be subordinated to the loan guarantee. The Department, therefore, should allow for *pari passu* treatment of the guaranteed debt because the current subordination requirement could severely limit the availability of commercial financing for a new project.

Minimum Equity Requirement. The NOPR seeks comment on whether the Department should require that sponsors of projects that are the subjects of Title XVII guarantees have substantial equity stakes in such projects, and further seeks comment on the merits of adopting a minimum equity percentage requirement for project sponsors. NOPR, 72 Fed. Reg. at 27476.

Ameren urges the Department not to set a minimum equity percentage requirement. Such a requirement is unnecessary in the case of project sponsors that are regulated utilities, such as Ameren. These utilities' decisions regarding the amount of equity to hold in a project are driven, in large part, by regulatory imperatives and the decisions of their state regulators. For other project sponsors, the key to securing financing is flexibility and if they are restricted by a minimum equity percentage, they likely will find it more difficult to secure financing at favorable rates. In short, a minimum equity percentage may only hinder, not help, financing of projects using innovative technologies.

Other Forms of Assistance. The NOPR proposes to consider whether a project sponsor will rely on other government assistance (including tax credits, grants, *etc.*) and seeks to minimize support through the Title XVII loan guarantee program of projects that rely on multiple forms of significant Federal assistance. NOPR, 72 Fed. Reg. at 27476. The NOPR provides that other forms of assistance will not disqualify a project from being eligible for a Title XVII loan guarantee, but will be a negative factor in the Department's evaluation of an application. *Id.* The NOPR notes, however, that in some cases, multiple forms of Federal assistance should be available in order to advance important national energy policy priorities, such as the development of the first new nuclear generating facilities in this century. *Id.*

Ameren supports the proposed approach to evaluating projects in light of the various forms of Federal assistance they may receive, so long as the Department does not apply the approach to applications for new nuclear projects. As the NOPR notes, EPAct provides for multiple forms of assistance for such projects, signaling that Congress placed a high priority on Federal encouragement of such projects and intended for them to receive a package of assistance. To then withhold loan guarantees from such projects on the basis of the other forms of Federal assistance for which they are eligible would run counter to EPAct.

Default and Audit Provisions

Proposed Section 609.15 of the Department's regulations would provide rules applicable to all Title XVII loan guarantees for default, demand, payment and collateral liquidation. Ameren urges the Department to clarify that the debt that is guaranteed under the Title XVII program will be non-recourse beyond the project, *i.e.*, lenders' only recourse will be to the project facilities and not to the owner(s) of such facilities. Otherwise, rating agencies will impute the guaranteed debt to the owner(s)' balance sheet(s). In that event, the owners of projects with Title XVII guarantees will be required to have higher equity ratios to maintain their credit ratings. This need for higher equity ratios would pose a substantial disincentive for companies to undertake projects using the innovative technologies Congress seeks to promote.

Conclusion

For the reasons stated above, Ameren respectfully requests that the Department consider Ameren's comments and modify accordingly certain provisions of the proposed rule regarding loan guarantees for projects that employ innovative technologies.

Respectfully submitted,

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